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May 28, 1997

Mr. Paull Mines
General Counsel
Multistate Tax Commission
444 North Capitol Street, N.W., Suite 425
Washington, DC 20001

Re: Working Group Draft of the Constitutional Nexus Guideline for Application of A State's Sales and Use Tax to an Out of State Business dated March 1997

Dear Paull:

On behalf of the Financial Institutions State Tax (FIST) Coalition, this letter constitutes comments regarding the Multistate Tax Commission's ("MTC") draft sales and use tax nexus guidelines captioned above.

While the draft purports to deal only with sales and use taxes, it indicates the intention to cover sales and the presence if intangible property within a State as an element, although the scope of the intangible property concept is not enunciated. In addition, the draft proposes that a mere security interest in property, real or tangible personal, can by itself be the basis for creating nexus with respect to the secured party. For these reasons, as well as our concerns expressed below, FIST finds it essential to submit comments even though it might otherwise seem that the draft proposal has only limited relevance to the financial services industry.

FIST strongly opposes the development of State-sponsored and implemented guidelines with respect to nexus. Apart from our concerns about technical aspects, including the items noted above, as well as the scope and conclusions of many of the examples (as to which we reserve the right to make specific comments at a later date), we believe this project is ill-advised.

In the first place, it is an attempt to set standards which only the United States Supreme Court and the Congress have the power and authority to do under the U.S. Constitution with regard to both the Due Process clause (which only the Supreme court can interpret and apply) and the Commerce Clause (which both the Supreme Court and Congress can address). Indeed, the Supreme Court has strongly suggested that the resolution of issues under the Commerce Clause is a Congressional responsibility. See *Quill Corp. v. North Dakota*, 122 S.Ct. 1904, 1916 (1992) where the majority opinion observed that Congress is better able to resolve Commerce Clause nexus issues and has the ultimate power to do so. The States, through the MTC or otherwise, cannot unilaterally establish the rules. There are also presently underway important judicial challenges to assertions by certain States of nexus based on so-called "economic nexus" which may have an important bearing on the validity of any claims of nexus based on that standard.

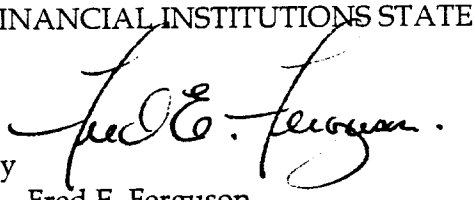
Until either the Supreme Court or Congress establishes viable fundamental guidelines, the development of nexus rules by the MTC at the present time may be a futile exercise.

In addition, these proposals raise serious questions with respect to their implications in the income/franchise tax areas. Although, as noted above, the draft attempts to carefully limit the application of the proposals to sales and use taxes, there have been strong suggestions by the MTC in the past that sales and use tax nexus standards are equally applicable to income/franchise taxes. See, *e.g.*, Final Report of Hearing Officer Regarding Proposed Multistate Tax Commission Formula for the Uniform Apportionment of Net Income From Financial Institutions, April 28, 1994, pages 22-42 at pages 29-30. Therefore, the potential extension of sales and use tax nexus rules to income/franchise taxes is obvious, despite the attempt to limit the scope of this draft.

Since it would be disingenuous to use these proposals as a "stalking horse" for the application of broad nexus rules to all taxes, any discussion of nexus should clearly encompass all taxing jurisdiction with respect to all States taxes, and all businesses, includes those involving services and intangibles.

Finally, we have one general comment on the thrust of the draft proposals - many of the examples reach conclusions based on obscure and difficult-to-ascertain factual situations. That approach will lead to a "gotcha" mentality and approach by State taxing authorities, as well as major uncertainties by businesses as the their nexus situations. As we strongly advocated and supported in the course of developing the financial institutions apportionment rules, a key consideration of any taxing rules should be ease of administration, application and audit, as well as clarity and certainty. See also *Quill Corp. v. North Dakota*, supra at 1915, wherein the Court's majority opinion notes that a bright-line test establishes boundaries, which provide the clear benefit of reducing controversy and confusion. FIST finds the draft proposals do not provide such essential elements. In the even you proceed with this project, FIST would appreciate the opportunity to participate in all future activities of the Working Group.

FINANCIAL INSTITUTIONS STATE TAX (FIST) COALITION,

By 

Fred E. Ferguson
Executive Director

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